

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>RALPH J. CATALDO,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 96-183-B-C</b>
	)	
<b>UNITED STATES DEPARTMENT</b>	)	
<b>OF JUSTICE, et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**RECOMMENDED DECISION ON MOTION TO DISMISS AND/OR FOR SUMMARY  
JUDGMENT OF DEFENDANT UNITED STATES DEPARTMENT OF JUSTICE**

The plaintiff, appearing *pro se*, has filed this lawsuit to press his contention that he suffered the deprivation of his right to due process in connection with circumstances surrounding his incarceration following his conviction for making harassing telephone calls. The United States Department of Justice (“DOJ”) is twice named as a defendant in the complaint, first via the office of the United States Attorney in Bangor and second via the United States Bureau of Prisons. The DOJ now moves for dismissal of the complaint on jurisdictional grounds and for failure to state a claim upon which relief can be granted. In the alternative, the department seeks summary judgment in its favor. For the reasons that follow, I recommend that the court dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a valid claim.

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). A defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts

alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

The plaintiff’s complaint seeks damages and injunctive relief based on his contention that the DOJ, “with the cooperation of a private individual,”<sup>1</sup> wilfully violated his right to due process as secured by 18 U.S.C. §§ 4244-45 and the Fifth Amendment to the Constitution. As the DOJ points out, albeit in cursory fashion, the plaintiff’s complaint requires dismissal based on the doctrine of sovereign immunity.

Agents of the government may, in appropriate circumstances, be personally liable for the deprivation of constitutional rights, *Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)), but the sovereign immunity of the United States is not waived thereby, *Gonsalves v. I.R.S.*, 975 F.2d 13, 15 (1st Cir. 1992). When a complaint alleging deprivation of constitutional rights by employees of the United States government does not identify or seek damages from those individual employees, dismissal is appropriate. *Id.* (citing *Bivens*, *supra*).

Notwithstanding the primacy of the DOJ’s allegations that the court is without subject matter jurisdiction to entertain the plaintiff’s complaint and that the court lacks personal jurisdiction in the circumstances, “[t]here is ample precedent for by-passing jurisdictional objections when the court can more easily dismiss on the merits.” *Sierra Club v. Larson*, 2 F.3d 462, 466 (1st Cir. 1993)

---

<sup>1</sup> It appears that the individual to whom the plaintiff alludes in this regard is defendant James Munch III. Although the complaint does not make this clear, other pleadings submitted by the plaintiff state that Munch was the attorney who represented him in connection with the criminal proceedings at issue. *See* Plaintiff Ralph J. Cataldo’s Objection to and Motion to Deny defendant James Munch’s Motion to Dismiss (Docket No. 6) at 1.

(citation omitted). I therefore do not address the jurisdictional issues. Nor is it necessary to reach the DOJ's assertion that it is entitled to dismissal under Rule 12(b)(5) for insufficiency of service of process, although I note in passing that the plaintiff appears *in forma pauperis* by leave of the court, which directed the U.S. Marshal to serve the complaint at government expense. Given that the U.S. Marshal and his deputies are officers of the Justice Department, it strikes me as untoward that the DOJ would seek dismissal of a complaint based, essentially, on a contention that the DOJ failed to serve a complaint upon itself properly. Finally, dismissal of the complaint for failure to state a valid claim renders the DOJ's summary judgment motion moot, although I would note that the DOJ has not even attempted to comply with Local Rule 19(b)<sup>2</sup> of this court, which requires a party seeking summary judgment to furnish a short and concise statement of material facts, with record citations, as to which it is contended no genuine issue exists. In these circumstances, were the summary judgment motion not moot it would require denial.

For the foregoing reasons, I recommend that the motion of the Department of Justice for dismissal of the claims against the Department of Justice be **GRANTED** and that the pending motion for summary judgment be denied as **MOOT**.

---

<sup>2</sup> The Local Rules are being recodified effective on March 1, 1997. As of that date, the cited requirement remains unchanged but will appear in Local Rule 56.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 19th day of February, 1997.*

---

*David M. Cohen  
United States Magistrate Judge*